87-1565

No. _____



IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

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THE STATE OF TEXAS,
*Petitioner,*

v.

OTIS LEN MODGLING,
*Respondent.*

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# PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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JIM MATTOX
Attorney General of Texas

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

MARY F. KELLER
First Assistant
Attorney General

CHARLES A. PALMER*
Assistant Attorney General

LOU McCREARY
Executive Assistant
Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

* *Counsel of Record*

When the child victim in a sexual abuse case testifies at trial as part of the state's case-in-chief and is fully cross-examined, does the introduction of an extrajudicial, videotaped statement of the child violate the defendant's right of confrontation?

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# PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Petitioner[1] herein, by and through its attorney, the Attorney General of Texas, and files this Petition for Writ of Certiorari.

## OPINION BELOW

The opinion of the Texas Court of Criminal Appeals was delivered on January 27, 1988, and is attached hereto as Appendix A. Modgling v. State, ___S.W.2d ___, No. 0468-86 (Tex. Crim. App. 1988).

[1]For clarity, the Petitioner is referred to as "the state," and the Respondent as "Modgling."

## JURISDICTION

The state invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The court below found that a state statute, Tex. Code Crim. Proc. Ann. art. 38.071 §2, (Vernon Supp. 1987), as applied to Modgling, violated the right of confrontation embodied in the sixth amendment to the United States Constitution. The state statute was amended by Acts 1987, 70th Leg., 2nd C.S., ch.55, §1, effective October 20, 1987. The statute in effect at the time of Modgling's trial provided as follows:

> §2 (a) The recording of an oral statement of the child made before the proceeding begins is admissible into evidence if:
>
> (1) no attorney for either party was present when the statement was made;
>
> (2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;
>
> (3) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;
>
> (4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;

(5) every voice on the recording is identified;

(6) the person conducting the interview of the child in the recording is present at the proceeding and available to testify or be cross-examined by either party;

(7) the defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence; and

(8) the child is available to testify.

(b) If the electronic recording of the oral statement of a child is admitted into evidence under this section, either party may call the child to testify, and the opposing party may cross-examine the child.

## STATEMENT OF THE CASE

### A. *Course of Proceedings and Disposition Below*

The state has lawful and valid custody of Modgling pursuant to a judgment and sentence of the 35th District Court of Brown County, Texas, in Cause No. 10-245, styled The State of Texas v. Otis Len Modgling. Modgling was charged with the felony offense of aggravated sexual abuse of a child pursuant to Tex. Penal Code Ann. §22.021(a)(5). Modgling pled not guilty and was tried by a jury, which, on March 29, 1985, found him guilty of the offense charged. Following a separate punishment hearing, the jury assessed punishment of imprisonment for six years.

Modgling appealed to the Eleventh Court of Appeals of Texas, which affirmed the conviction on February 20, 1986. Modgling v. State, No. 11-85-00117-CR. On March 20, 1986, the court of appeals overruled Modgling's motion for rehearing. Modgling then filed a petition for discretionary review by the Texas Court of Criminal Appeals. That court granted the petition and, in an opinion delivered on January 27, 1988, reversed the conviction on the ground that the admission of an extrajudicial, videotaped statement of the child victim denied Modgling his right of confrontation.[2]

**B. *Statement of Facts***

The complaining witness against Modgling was his seven year-old stepdaughter, Savannah Angeline Motley. After Savannah told her mother, Sarah Modgling, that she had been sexually abused by Modgling, the child was interviewed by a social worker for the Texas Department of Human Services, Sharon Kay Oliver (SF IV 14, 16-17).[3] The only other person

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[2]The court below reversed Modgling's conviction on the basis of *Long v. State*, ___ S.W.2d ___, No. 867-85 (Tex. Crim. App. July 1, 1987), *cert. pending sub nom. State of Texas v. Long*, No. 87-1032. There are two differences between this case and *Long*. In *Long*, the Texas court ruled on the basis of the state and federal rights of confrontation as well as the federal Due Process Clause and the state Due Course of Law provision; here, by contrast, the court below relied solely on the federal Confrontation Clause. Thus, there can be no question in this case as to whether the court's decision might rest on an adequate, independent state ground. Also, in *Long*, the child victim did not testify for the state but instead was called by the defense for purposes of cross-examination; here, the child did testify during the state's case-in-chief.

[3]"SF" refers to the statement of facts of Modgling's trial, the volume referenced by Roman numeral and the page by Arabic number.

present at the interview was the child's mother, who helped to establish certain dates (SF IV 20). No leading or suggestive questions were asked of the child (SF IV 23), and the interview lasted approximately twenty minutes (SF IV 24). A videotape was made of the child's statement, and defense counsel was afforded an opportunity to view it (SF IV 26). At defense counsel's suggestion, the tape was edited and re-edited so that the child's mother did not appear on it (SF IV 25-27). The edited tape, State's Exhibit No. 1 (SF IV 28), was admitted at trial over objection (SF IV 39). The tape is not contained in the appellate record in the court below, and its content is not set out in the record.

After the videotaped statement was introduced, the state put on several witnesses, including the child, Savannah Motley. She first was questioned by the court outside the presence of the jury to determine her competency as a witness (SF IV 103-05). Savannah then testified during the state's case-in-chief (SF IV 123-39), following which she was cross-examined by the defense (SF IV 140-43).

The defendant testified in his own behalf and denied commission of the offense (SF IV 144 *et seq.*). The defense then presented the testimony of seven other witnesses, following which Modgling again took the stand and testified further in his behalf (SF IV 244 *et seq.*). Because none of the witnesses for the state or the defense had personal knowledge of the offense, the trial was, in essence, a swearing match between Modgling and the seven-year-old child.

## SUMMARY OF THE ARGUMENT

There are special and important reasons to grant review in this case. First, the decision of the court below is in conflict with decisions of this Court, including *Kentucky v. Stincer,* 482 U.S. ___, 107 S.Ct. 2658 (1987). Second, the decision of the court below is in conflict with decisions of other state courts of last resort. Finally, the writ should issue because the court below plainly misapplied federal constitutional law in finding a violation of the Confrontation Clause.

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THIS COURT'S DECISIONS IN *KENTUCKY V. STINCER.* 482 U.S. ___, 107 S.CT. 2658 (1987), AND *CALIFORNIA V. GREEN,* 399 U.S. 149 (1970).

The court below found that the Texas statute, as applied to Modgling, was unconstitutional because it abridged his sixth amendment right to confront his accusers. As the dissenting opinions correctly point out, the Texas court misconstrued the federal Confrontation Clause in finding that admission of the out-of-court videotaped statement constituted a constitutional violation even though the child witness testified at trial and was fully cross-examined by the defense.

In *Kentucky v. Stincer,* 482 U.S. ___, 107 S.Ct. 2658 (1987), the Court considered whether the exclusion of a defendant from a hearing held to determine the competency of two child witnesses violated the Confrontation Clause. In finding that it

did not, the Court emphasized that the overriding consideration in deciding confrontation issues is "whether excluding the defendant from the hearing interferes with his opportunity for effective cross examination." *Id.* at ___, 107 S.Ct. at 2664. *See also California v. Green*, 399 U.S. 149, 159 (1970) ("[T]he inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be of crucial significance as long as the defendant is assured of full and effective cross examination at the time of trial").

Here, it is undisputed that Modgling not only had the "opportunity" for effective cross-examination, he in fact did cross-examine the child victim at trial. Here, as in *Stincer*, "[t]here was no [Texas] rule of law, nor any ruling by the trial court, that restricted [Modgling's] ability to cross examine the witnesses at trial." *Id.* at ___, 107 S.Ct. at 2664.

While it is true that *Stincer* involved a pretrial hearing on the witnesses' competency to testify, whereas the videotaped statement at issue here dealt with the child's substantive testimony, this distinction is irrelevant to the confrontation issue:

> [T]he question whether a particular proceeding is critical to the outcome of a trial is not the proper inquiry in determining whether the Confrontation Clause has been violated. The appropriate question is whether there has been any interference with the defendant's opportunity for effective cross-examination.

*Id.* at ___ n.17, 107 S.Ct. at 2666 n.17.[4]

The decision of the court below cannot be squared with *Stincer* or *Green*. The Court should exercise its certiorari jurisdiction to correct the Texas court's misinterpretation of federal constitutional law. *See Oregon v. Kennedy*, 456 U.S. 667, 668-69 (1982) (certiorari granted because state court took an "overly expansive view of the Double Jeopardy Clause"); *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (certiorari granted because state court "has read *Miranda* too broadly"); *Hudson v. Louisiana*, 450 U.S. 40, 44-45 (1981) (certiorari granted because Louisiana Supreme Court failed to recognize that "there are no significant facts which distinguish this case from *Burks*" [*v. United States*, 437 U.S. 1 (1978)].

## II.

## THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH DECISIONS OF THE SUPREME COURT OF ARKANSAS AND THE SUPREME COURT OF INDIANA.

In addition to being in conflict with decisions of this Court, the opinion of the Texas court is also in irreconcilable conflict with the opinions of the Supreme Court of Arkansas in *Cogburn v. State*, 732 S.W.2d 807, 810-11 (Ark. 1987) and the Supreme Court of Indiana in *Jones v. State*, 445 N.E.2d 98, 100 (Ind. 1983). In those cases, the Arkansas and Indiana courts considered Confrontation Clause challenges to similar state statutes and found that, where the defen-

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[4]Were there a due process claim before the Court, this distinction might be of greater import. *See Stincer*, 482 U.S. at ___, 107 S.Ct. at 2667-68.

dant was able to cross examine the child complainant at trial, there was no confrontation violation. Where, as here, there is a conflict of authority among two state courts of last resort on an important issue of federal constitutional law, the Court should exercise its certiorari jurisdiction to resolve the conflict. *E.g., Dun & Bradstreet. Inc. v. Greenmoss Builders. Inc.*, 472 U.S. 749, 753 n.l (1985); *Fuller v. Oregon.* 417 U.S. 40, 42 & n.3 (1974).

## III.

## THE COURT BELOW INCORRECTLY DECIDED AN IMPORTANT ISSUE OF FEDERAL CONSTITUTIONAL LAW.

As discussed in Sections I and II, *supra*, the decision of the court below is in conflict with decisions of this Court and other state courts of last resort. The fatal flaw in the opinion of the Texas court is its failure to recognize that a defendant's right of confrontation is a "trial right." See *Barber v. Page*, 390 U.S. 719, 725 (1968), cited in *Stincer*, 482 U.S. at ___ n.9, 107 S.Ct. at 2663 n.9. Had the court below correctly applied settled Confrontation Clause jurisprudence, it would have recognized that because Modgling fully cross-examined the child victim at trial, he was not denied his federal right of confrontation. The writ should issue to correct an obvious misconstruction of the federal Constitution.

## CONCLUSION

For these reasons, the state prays that the petition for writ of certiorari be granted.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

LOU McCREARY
Executive Assistant
Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

*Counsel of Record

*CHARLES A. PALMER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

*Attorneys for Petitioner*

## APPENDIX A

| | |
|---|---|
| **OTIS LEN MODGLING, Appellant** | **Petition for Discretionary Review from the Court of Appeals, Eleventh Supreme Judicial District of Texas (BROWN COUNTY)** |
| **NO. 0468-86 v.** | |
| **THE STATE OF TEXAS, Appellee** | |

## OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

The appellant was indicted for aggravated sexual abuse of a child as proscribed by §22.021(a)(5) of the Texas Penal Code. Following a jury trial, the appellant was convicted and assessed punishment by the jury at six years confinement in the Texas Department of Corrections.

On appeal to the Eleventh Court of Appeals the appellant claimed, *inter alia*, and most significantly, that the trial court's admission of a pretrial videotaped interview of the complainant, as authorized by Art. 38.071 §2, V.A.C.C.P., was improper because the statute is an unconstitutional deprivation of his right of confrontation under the Sixth Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment. See: *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).[1] In an unpublished opinion the Court of

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[1]Appellant in challenging the constitutionality of Art. 38.071 §2 V.A.C.C.P, relies solely on the Sixth and Fourteenth Amendments to the United States Constitution and at no stage of the proceeding urged Art. I §10 of the Texas State Constitution. See: *White v. State*, 543 S.W.2d 366,369 (Tex.Cr.App. 1976). Hence the review in this case will be restricted to those constitutional provisions.

Appeals, adhering to their previous holding in *Alexander v. State,* 692 S.W.2d 563 (Tex.App.--Eastland 1985, no pet.), held that §2 of Art. 38.071 V.A.C.C.P., was not unconstitutional in that it did not deny the right to effective cross-examination and confrontation of a witness as guaranteed by the due process requirements of the Sixth and Fourteenth Amendments of the United States Constitution. *Modgling v. State,* ___S.W.2d___ (Tex.App., No. 11-85-117-Cr).

The appellant's Petition for Discretionary Review was granted to review the Court of Appeals' conclusion.

In light of our recent decision in, *Long v. State,* ___S.W.2d___ (Tex.Cr.App., No. 867-85, delivered July 1, 1987) we find that the Court of Appeals erred and appellant's conviction must be reversed.

The facts pertinent to the constitutionality of Art. 38.071 § 2, V.A.C.C.P., are virtually indistinguishable from those of *Long, supra,* with the exception that in the instant case the child witness testified before the jury after the introduction into evidence of the pre-trial videotaped interview, in the state's case-in-chief; rather than in rebuttal.

In *Long v. State, supra,* this Court after an extensive analysis of the confrontation clause of the Sixth Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment in relation to Art. 38.071 §2 V.A.C.C.P., held the following:

> Based on our previous observations and authorities for reasons stated, we find Art. 38.071, §2, *supra,* is both facially and as it was applied to the appellant an unconsti-

tutional deprivation of his right of confrontation under the Sixth and Fourteenth Amendments to the United States constitution.[2]

* * *

Having determined in *Long, supra*, that Art. 38.071 §2, V.A.C.C.P., is facially unconstitutional under the Federal Constitution the court of appeals is reversed and the case is remanded to the trial court for a new trial.[3]

PER CURIAM

(Delivered January 27, 1988)
EN BANC
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[2]This Court in *Long, Id.*, also found as an independent state ground that Art. 38.071 §2 V.A.C.C.P, was facially unconstitutional under Art. I §10, of the Texas State Constitution as it was a denial of the guaranteed right confrontation and cross-examination. As was previously stated appellant relied entirely on the Federal Constitution.

This Court additionally found that Art. 38.071 §2, V.A.C.C.P., was violative of both the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Course of Law provision of Art. I §19 of the Texas State Constitution as the procedure permitted by the statute in question allowed the prosecution to in essence introduce their case-in-chief twice, "permitting the state to bolster its version of the facts and thus unconstitutionally alter the system to the extent that both 'the perception as well as the reality of fairness...,' *Id.*, are exchanged for the advantage integral to the duplication of evidence." This procedure was found to stray too far from the accepted trial practice giving the prosecution a benefit at the expense of fundamental fairness to the defendant.

[3]Appellant had five additional Grounds of Review raised in his Petition for Discretionary Review which this Court granted review. However, since each ground dealt with the admissibility of the pre-trial videotaped interview it is not necessary to reach those issues.

## APPENDIX B

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| **OTIS LEN MODGLING, Appellant** | **Petition for Discretionary Review from the Court of Appeals, Eleventh Supreme Judicial District of Texas (BROWN COUNTY)** |
| **NO. 0468-86 v.** | |
| **THE STATE OF TEXAS, Appellee** | |

## DISSENTING OPINION

The majority today adds fuel to the fire named *Long v. State*, ___ S.W.2d ___, (Tex.Cr.App., No.867-85, delivered July 1, 1987) by its handling of this case. The very issues allegedly relied upon by the *Long* majority to reverse the conviction of a child abuser are now overlooked, with *no* analysis regarding appellant's constitutional rights to confrontation and due process of law *vis a vis* the facts of this particular case. Judge Teague points out in his dissenting opinion today, the factual distinctions between the circumstances in *Long* and those in the instant case deserve proper reflection and a decision based upon *these* facts alone. I disagreed with the *Long* majority as to the videotape procedure denying the appellant his right to confrontation and due process, and even more strongly oppose the superficial "application" of the *Long* decision in this case. Here, the child complainant was not only "available" to testify, but was called as a witness by the prosecution and was subsequently passed to the defense for cross-examination. There is no indication that appellant was stifled in his ability and opportunity to question the complainant, or in the jury's ability to test the credibility and demeanor of the witness.

Finally, the majority has again failed to recognize, much less discuss, the relationship between Art.

38.071, V.A.C.C.P. and our recently promulgated and enacted rules of evidence for criminal actions. In Rule 80(e)(l)(D) it is unambiguously stated that a videotaped statement taken in accordance with the procedures required by Art. 38.071, supra, is admissible in evidence as a prior statement of the complainant, where the child testifies and is subject to cross-examination concerning the statement. In the instant case, the videotaped statement patently comes within the parameters of the Court's own rules. I am disturbed both by the maverick manner in which this case is decided, and by the majority's apparent refusal to follow, when expedient, the policies, procedures and rules this court has set down for application in all criminal matters. For these reasons, I respectfully dissent.

W. C. DAVIS, Judge

Delivered January 27, 1988

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McCormick, J. Joins

## APPENDIX C

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| **OTIS LEN MODGLING, Appellant** | **Petition for Discretionary Review from the Court of Appeals, Eleventh Supreme Judicial District of Texas (BROWN COUNTY)** |
| **NO. 0468-86 v.** | |
| **THE STATE OF TEXAS, Appellee** | |

## DISSENTING OPINION

I respectfully dissent.

The majority opinion correctly points out that "in the instant case the child witness testified before the jury after the introduction into evidence of the pre-trial videotaped interview, in the State's case-in-chief; rather than in rebuttal." Thus, a clear distinction between the facts of *Long v. State*, __S.W.2d__ (Tex.Cr.App., No. 867-85, July 1, 1987), and this cause exists.

Given the above facts, I must ask: Given the facts that the complainant, appellant's accuser, testified in this cause, how has appellant been denied his federal constitutional right of cross-examination and confrontation and his federal constitutional right to the effective assistance of counsel? To answer this question by merely referring the reader to an overly-broad and unnecessary holding that was made in *Long, supra*, is actually not to answer the question at all.

In dissenting to the majority opinion, however, I do not retreat one inch from what I stated in the concurring opinion that I filed in *Long v. State*, supra, in which I agreed with the majority opinion that, as applied to that case, Art. 38.071, Sec. 2, V.A.C.C.P. was clearly unconstitutional, under both the federal and state constitutions.

The issue that should be addressed by this Court, but which is not, is whether, given the facts of this cause, the due process clause of the Fourteenth Amendment and the assistance of counsel clause of the Sixth Amendment were violated by introducing the videotape of the child witness before she testified in this cause. This issue unquestionably is limited to whether any of appellant's rights were violated by the State "bolstering" the videotaped recording with the testimony of the child witness. Because the majority opinion does not address this question, I am compelled to respectfully dissent.

TEAGUE, Judge

EN BANC

DELIVERED: January 27, 1988

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